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March 22, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

**Re: D.T.E.05-4 – Complaint of Verizon New England, Inc. d/b/a
Massachusetts Concerning Customer Transfer Charges Imposed By
Broadview Networks, Inc.**

Dear Ms. Cottrell:

At the March 16th procedural conference in this matter, the Department asked Verizon Massachusetts (“Verizon MA”) to provide the legal basis for not paying charges imposed by Broadview Networks, Inc. (“Broadview”) when a Broadview customer transfers to Verizon’s services. Verizon MA’s response is as follows.

First, Broadview has billed Verizon MA Service Transfer Charges pursuant to Section 9.1.1 of its Access Services Tariff (M.D.T.E. Tariff No. 2). Such billing is in conflict with Broadview’s Tariff as a whole. In its Complaint, Verizon MA assumed, *arguendo*, that Broadview’s Access Services Tariff applies to Verizon. *See* Verizon Complaint, at 3 n.2. However, as discussed below and in Verizon MA’s Complaint, the applicability of that Tariff to Verizon is doubtful in the extreme.

As stated on the Title Page, Broadview’s tariff “applies to the Access Services furnished by Broadview Networks, Inc. between one or more points within the Commonwealth of Massachusetts.” M.D.T.E Tariff No. 2, Title Page. The “General Regulations” – which govern the scope and application of the Tariff - state that “[t]his tariff contains regulations, rates and charges applicable to the provision of access services by Broadview Networks, Inc. to *Customers*.” *Id.* at Sec. 2.1.1 (emphasis added). Under this overarching provision, Broadview’s Service Transfer Charges, as set forth in Section 9.1 of the Tariff, would not apply to Verizon.

Verizon is not a “Customer” of Broadview, as defined in Section 1.2 of the Access Services Tariff. A “Customer” is referred to as an entity “which subscribes to the services offered under this tariff, including both Interexchange Carriers and End Users.”

Id. at Sec. 1.2. Verizon is neither an interexchange carrier with respect to the “service transfers” at issue here, nor an end user. Indeed, the definition of “End User” in Section 1.2 of that Tariff specifically excludes carriers, except to the extent that they use service for administrative purposes. Moreover, Verizon does not “subscribe” to any Broadview services in connection with service transfers.

It is well established that the terms of the tariff form part of the contractual relationship between the parties. *See Wilkinson v. New England Tel. & Tel. Co.*, 327 Mass. 132, 135, 97 N.E.2d 413 (1951). Under Massachusetts law, a common carrier may not construe its tariff in an “unreasonable” manner. *See Boston Phoenix v. New England Tel. & Tel. Co.*, 1996 Mass. Super. LEXIS 157 at *26 (1996); *New England Tel. & Tel. Co. v. National Merchandising Corp.*, 335 Mass. 658, 664-65, 141 N.E.2d 702 (1957). The language “must be considered in light of the other words surrounding [it],” and its scope and meaning must be determined by reference to context.¹ *Commonwealth v. Brooks*, 366 Mass. 423, 428, 319 N.E.2d 901 (1974). Massachusetts courts have also adhered to the standard rule of construction that if language is ambiguous, it will be construed against the drafter under the principle of *contra proferentum*.² *See Vappi & Co., Inc. v. Aetna Casualty & Surety Co.*, 348 Mass. 427, 431, 204 N.E.2d 273 (1965); *Metropolitan Property and Casualty Insurance Company v. Gary Lombard et al.*, 197 Mass. Super. LEXIS 235 at *8 (1997).

While Broadview clearly *wants* to apply these charges to Verizon (as evidenced by the fact that it has already billed Verizon), the lawfulness of doing so is not determined by Broadview’s desires and intentions, but by the words of the tariff that Broadview drafted and filed. Broadview has chosen to include in its “Access Services” Tariff Service Transfer Charges that are unrelated to access (thus, in effect, concealing those charges from potentially affected entities). Yet, the ambiguity created by the General Regulations drafted by Broadview itself – and the dubious legality of the charges (if applied in the manner that Broadview desires) - suggest that the standard

¹ In determining what is reasonable, Massachusetts courts have applied the same fundamental canons of construction that apply to all regulations and statutes. That is, “the regulation must also be interpreted according to the intent of the [officer or agency responsible for its promulgation] ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. 737, 744, 640 N.E.2d 1101 (1994).

² Massachusetts courts have found that ambiguous language is to be resolved against the drafter *except* in instances where the form or substance of the document is prescribed by statute. *Charles Dowd Box Co., Inc. v. Fireman's Fund Insurance Company*, 351 Mass. 113; 119-20, 218 N.E.2d 64 (1966).

contra proferentum rule should be applied to interpret the Service Transfer provisions of the Tariff as inapplicable to Verizon.

Second, in light of the genuine questions regarding the applicability and proper interpretation of certain provisions of Broadview's Access Services Tariff, Verizon has appropriately disputed the charges associated with Service Transfers, and has notified Broadview accordingly pursuant to the terms of its Interconnection Agreement. Consistent with Section 9.3 of the Agreement - which requires that "the billed Party shall pay by the Due Date all *undisputed* amounts" - Verizon has withheld payment of the disputed Service Transfer Charges. Likewise, pursuant to dispute resolution procedures under Section 14 of that Agreement, Verizon MA has sought Department resolution of the dispute by initiating this Complaint against Broadview.³

In conclusion, Broadview purports to apply Service Transfer Charges to Verizon MA under an Access Services Tariff, to which Verizon is not subject. Verizon MA has disputed - and refused to make payment on - those outstanding charges in compliance with the process set forth in the Agreement between the parties to resolve such billing disputes. Accordingly, for the reasons set forth in Verizon MA's Complaint, the Department should either conclude that the charges are not applicable to Verizon under Broadview's Access Services Tariff, or else declare them unlawful.

Please contact me if there are any further questions regarding this matter. Thank you for your assistance.

Very truly yours,

/s/Barbara Anne Sousa

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cc: Attached D.T.E. 05-4 Service List

³ It should be noted that questions of *tariff interpretation* are generally resolved, in the first instance, by the agency which approved the *tariff*, and not by the courts. *Whitinsville Water Company v. Covich*, 24 Mass. App. Ct. 925, 507 N.E.2d 1059 (1987).